

Highlights of the 2008 Rule Changes

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The reports of the various Supreme Court Advisory Committees, recommending proposed changes to the rules, are submitted to the Idaho Supreme Court, which reviews each proposal. The 2007-2008 proposals have resulted in the ordering of the following rule changes, which will go into effect on July 1, 2008, unless otherwise noted. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/rulesamd.htm>.

Appellate Rules

The Appellate Rules Advisory Committee is chaired by Chief Justice Daniel Eismann. Although that committee did not meet in 2007, orders were entered in January and February of 2008, setting forth amendments that went into effect on March 1, 2008. Most of these were the result of recommendations from the Court Reporter Committee and the Administrative Conference and were made as part of a continuing effort to ensure the timely resolution of appeals. In addition, there are several amendments to Rule 31, on exhibits, effective July 1, 2008.

Rule 12.1. Permissive appeal in custody cases. Whenever the best interests of a child would be served by an immediate appeal, this rule on permissive appeal allows the parties or the magistrate hearing the case to petition the Supreme Court to take a direct permissive appeal without first going to the district court if the judgment involves custody of a minor, termination of parental rights, or adoption. Effective March 1, 2008, this rule was amended to include appeals from Child Protective Act proceedings.

Rule 17. Notice of appeal-contents. The amendment, effective March 1, 2008, requires the appellant to specifically identify by name and address each court reporter from whom a transcript is being requested and to certify that each of these reporters was served with the notice. The purpose of the amendment is to ensure that a reporter is promptly notified of the request. While most cases involve only the official court reporter for the district judge, there are cases that involve more than one reporter. The names of the court reporters should be in the district court file and as of March 1, should appear on the Register of Actions.

The same requirement applies to an amended notice of appeal that is requesting additional transcripts. An amended notice requesting added transcripts must also include an estimate of the number of additional pages to be transcribed. This should be in the court file or can be obtained by contacting the reporter. The number of pages is used to determine the due date for the transcript.

Rule 18. **Notice of cross appeal.** Effective March 1, 2008, this rule was amended the same as Rule 17 to require the cross-appellant to certify that any additional requests for transcripts were served on a named reporter.

Rule 19. **Request for additional transcript or clerk's or agency's record.** As of March 1, 2008, a person making a request under this rule for additional transcript must certify that each reporter from whom a transcript is being requested was served with the request, specifically setting out the name and address of the reporter. The request must also include an estimate of the number of pages as to each transcript requested in the motion so that a due date for the additional transcript can be set. If additional record is requested, the person must also certify that the request was served on the clerk.

Rule 20. **Filing and service of documents.** In accord with the changes to Rule 17, effective March 1, 2008, the court reporter was added to the list of persons who must be served with a notice of appeal. In addition, the rule now requires the clerk of the Supreme Court to notify the reporters identified in the clerk's certificate of appeal that a transcript has been requested.

Rule 23. **Filing fees and clerk's certificate of appeal-waiver of appellate filing fee.** The certificate for the clerk now includes the names of the reporters from whom a transcript has been requested and the clerk sends the certificate to the Supreme Court with the notice of appeal or cross-appeal. The clerk's certificate will also include the estimated number of pages to be transcribed. This amendment was effective March 1, 2008.

Rule 24 (d). **Reporter's transcript- time for preparation.** Previous to March 1, 2008, the same time frame was used for the lodging of transcripts without regard to the length of the transcript. The Supreme Court has now adopted a new tiered approach for due dates for transcripts based on the number of estimated pages. If a transcript is estimated to be fewer than 100 pages, it is due within 30 days from the filing of the notice of appeal. If the transcript is estimated to be between 100 and 500 pages, then it is due within 63 days from the filing of the notice of appeal. If the transcript is estimated to be over 500 pages, then the court reporter files a form with the court, estimating the length of time required, and the Supreme Court sets a due date. The rule also details how a request for an extension of time is to be submitted and details steps taken when a transcript is more than fourteen days past due. In the event the reporter has failed to estimate the fees for the transcript, the estimated fee has been raised to \$200.00.

Rule 27(d). **Clerk or agency's record- time for preparation.** Effective March 1, 2008, this rule was amended to require the clerk to prepare the record and have it ready for service on the parties within thirty days of the filing of the notice of appeal. The clerk will still retain the record until the reporter's transcript, if any, is finished and then it will be sent to the parties for settlement.

Rule 30. **Augmentation or deletions from transcript or record.** This rule was amended effective March 1, 2008, to require that any request for augmentation with a transcript yet to be transcribed, specifically identify the name of the reporter along with the date and title of the proceeding, and an estimate of the number of pages to be transcribed. A form for all motions to

augment is now included in a new subsection (b) and the subsection requires that all motions to augment be substantially in this form.

Rule 31. Exhibits, recordings and documents. As of July 1, the district court clerks and agency clerks will no longer be sending original documentary exhibits to the Supreme Court for appeals. Instead, the clerks will send copies of all documents, charts and pictures offered as exhibits in a trial or a hearing. Other exhibits will be retained at the district court, unless it is a death penalty case, in which case the clerk will send photographs of these other exhibits to the Supreme Court. In all other cases, photographs of these exhibits will be sent upon request of a party. The certificate of exhibits will specifically identify each document sent to the Supreme Court and will also state if no exhibits are being sent to the Supreme Court.

In conjunction with an amendment to the criminal rules, pictures of child pornography attached to a presentence investigation report that are identified in a separate envelope will be retained at the district court when there is an appeal, unless specifically requested.

Civil Rules

The Civil Rules Advisory Committee, chaired by Justice Warren Jones, met on January 25, 2008, recommending amendments that have resulted in the following changes:

Rule 26(b)(4)(C). Fees of expert- apportionment. This rule has been amended to clarify that if discovery of an expert is obtained by deposition, then the party seeking discovery is to pay the expert a reasonable fee.

Rule 35(a). Physical and mental examination of persons. The amendment requires that the person being examined be notified of any tests or procedures to be performed and provides for the right of the party being examined to have a representative of his or her choice present.

Rule 35(b). Report of examining physician. This rule has been amended to provide access to all other writings or recordings created by the examiner or the party, including the originals of forms and test score sheets. This amendment is aimed at allowing access to the raw data used to net the expert's results so that the party's own expert can assess the conclusions reached and see if they are supported by the data.

Rule 45(b). Subpoena for production or inspection of documents, electronically stored information or tangible things or inspection of premises. The amendment to this rule inserts the phrase "unless otherwise ordered by the court" before the requirement that the party serving the subpoena serve a copy on the opposing party at least seven days prior to service on a third party. In addition, the opening sentence of the rule has been moved to the end of subsection (1).

Rule 57. Declaratory judgments. This rule on declaratory judgments has been amended to provide that in an action seeking declaratory judgment as to coverage under a policy of insurance any person known to any party to have a claim against the insured relating to the incident that is the subject of the declaratory action shall be joined if feasible. The purpose of the amendment is

to address the situation where there is an accident with injuries and the insurance company files a declaratory action as to coverage against the policy owner/driver and obtains a default judgment without the injured party knowing about it.

Rule 60(b). **Mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, grounds for relief from judgment or order.** The amendment removes the six month limitation on motions for relief based on (6) “any other reason justifying relief”. The last sentence of the rule now has subsections so that it is clear each phrase refers to a separate circumstance.

Rule 82(c)(4) and (c)(5). **Jurisdiction and venue.** The amendments eliminate the need for the Administrative District Judge to seek Supreme Court approval for special assignments to magistrate judges.

Filing Fee Schedule. There is a new filing fee schedule. An opening explanation as to charging fees and what constitutes an appearance by a person other than a plaintiff or petitioner has been added. References to “with prior appearance” and “no prior appearance” have been deleted and a few categories have been consolidated or eliminated.

Child Support Guidelines.

The Child Support Guidelines Advisory Committee, chaired by Judge Michael Redman, met on January 11, 2008. The recommendations of the Committee were adopted, resulting in the following rule changes.

Section 3. **Function of guidelines.** The amendment to this rule is to clarify that the award of child support includes both the basic child support calculation and all of the adjustments. The clarification is important as there is no statute of limitations on the collection of child support awards that are in arrears. In keeping with this idea, the term basic child support calculation replaces the reference to basic child support award so it is clear the award encompasses more.

Section 6 (c). **Guidelines income determination – income defined – potential income.** This section on potential earned income states “a parent shall not be deemed underemployed if gainfully employed on a full-time basis at the same or similar occupation in which he/she was employed for more than six months before the filing of the action or separation of the parties, whichever occurs first.” The intent is to pay deference to persons who have made a change in jobs for valid reasons and not in an attempt to lower child support. The six months is intended to show the stability of the job and that it is a serious life style change. The current amendment is to clarify how the six month provision applies to motions for modification of child support. It reads, “On post-judgment motions, the six month period is calculated from the date the motion is filed.”

Section 8 (a). **Adjustments to basic child support.** Subsection (a) on child care costs has a footnote that reads, “If the court imputes income to a student parent, then the court may order up to a pro-rata sharing of the student’s reasonable child care expenses while attending school.” The amendment moves the statement into the main body of the rule.

Section 8(d). Health insurance premiums and health care expenses not covered by insurance. The amendment removes conflicting statements found at the end of the section. Currently this guideline states that payments *will* be made directly between the parties and yet in the next sentence provides that insurance premiums *may instead* be a credit or an addition. The first sentence is really referring to all medical payments while the last sentence is referring to just the insurance premiums. To clarify this conflict, the amended section will now read: “These payments shall be in addition to the child support award and will be paid directly between the parties; however, the prorata share of the monthly insurance premium may instead be either a credit against or in addition to the basic child support obligation.”

Section 10 (a). Computations. Basic Child Support. There are new charts and tables for use in calculating basic child support.

Section 11: Disability and retirement benefits paid to child. Disability benefits for the dependent of a disabled person go toward satisfying the disabled parent’s support obligation, but the Committee recommended this section be amended to clarify that it was not referring to benefits for a disabled child, as benefits for a child are not income of the primary parent. Thus, this section has been amended by the addition of the following statement, “[P]ayments received as a result of the child’s disability are not income of either parent.”

Criminal Rules

The Criminal Rules Advisory Committee, chaired by Justice Roger Burdick did not meet in 2007; however, the court has made several amendments to the criminal rules.

Rule 2.2 (e) and (f). Special Assignment to Attorney Magistrates. The amendments eliminate the need for the Administrative District Judge to seek Supreme Court approval for special assignments to magistrate judges.

Rule 32. Standards and procedures governing presentence investigations and reports. The presentence investigation report sometimes contains child pornography unrelated to the charged offense; for example, child pornography found on a defendant’s computer. The rule has been amended to provide that any pictures or depictions of child pornography that are included as attachments to the PSI be placed in a separately identified envelope. This is the responsibility of the presentence investigator. The trial court may withhold this envelope from disclosure, pursuant to I.C.R. 32 (g)(1), and it is not to be sent to the Supreme Court as part of an appeal unless it is specifically requested.

Rule 33.3. Evaluation of persons guilty of domestic assault or domestic battery. The Domestic Assault and Battery Evaluator Advisory Board, chaired by Judge Gary DeMeyer, met on February 27, 2008, and recommended several amendments to this rule that were adopted by the Supreme Court. Beginning July 1, 2008, a licensed social worker will no longer be qualified unless he or she is a licensed master social worker, and marriage and family therapists have been

added to the list of qualified persons. With this change, all applicants will have graduate level training. In addition, applicants will need twenty hours of specialized training in the previous two years as part of the initial application. The Idaho Coalition Against Sexual Assault and Domestic Violence has also been added to the list of organizations that sponsor training.

Evidence Rules

The Evidence Rules Advisory Committee, chaired by Judge Karen Lansing, met on November 9, 2007, and based on their recommendations there are several amendments to the rules.

Rule 101. Title and scope. The rules of evidence do not apply to certain proceedings listed in Rule 101(e). This rule was amended to add a reference to proceedings under the judicial consent to abortion statute to this list.

Rule 507. Conduct of mediations. For the last few years a special subcommittee has been reviewing the Uniform Mediation Act and I.R.E. 507 with the purpose of making a recommendation to the Evidence Rules Advisory Committee whether Idaho should revise Rule 507 and/or adopt the UMA as a rule or as a statute or both. At the November meeting, a revised proposed Mediation Rule 507 was presented for the committee's consideration based on the Uniform Act. After much discussion, a new rule was presented to the court, resulting in adoption of a new Rule 507 on conduct of mediations. In addition to giving the parties a privilege, the rule gives the mediator a privilege so that the mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator even if the parties to the mediation have waived their privilege and want the mediator to testify. Thus, while the mediator cannot preclude the parties from testifying as to what they said in the mediation should they choose to waive their privilege, the mediator can refuse to be drawn into a later lawsuit and prevent others from testifying about anything that the mediator said during the mediation.

Rule 804. Hearsay exceptions; declarant unavailable. A new subsection entitled "forfeiture by wrongdoing" has been added to this rule on hearsay exceptions where the declarant is unavailable. The language adopted by the court follows the federal rule of evidence and allows for statements offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did procure, the unavailability of the declarant as a witness.

Misdemeanor/Infraction Rules.

Misd. Rule 3 and Infraction Rule 3. Citable offenses - Methods of initiating. These rules have limited a citation to charging no more than two violations or offenses. The limitation was based primarily on the physical size of the citation; however, with the new e-citation, there is the capability of listing more than two violations on a single citation. Thus, the limitation has been removed and the rule now states that more than one violation may be charged in one citation.

The various rules advisory committees meet annually as the need dictates. Currently both the Civil Rules Advisory Committee and the Criminal Rules Advisory Committee are scheduled to

meet in September of 2008. Agenda items may be submitted to the chair of the particular committee or to me, as reporter for the committees. A listing of Supreme Court Committees and their membership can be found at www.isc.idaho.gov under judicial rosters- judicial committees.